



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

SEAN BRENNAN

SENIOR LECTURER

DIRECTOR, INDIGENOUS LEGAL
ISSUES PROJECT

28 May 2010

Committee Secretary
House of Representatives Standing Committee on
Aboriginal and Torres Strait Islander Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Sir/Madam

**Submission to Inquiry into the high level of involvement of Indigenous juveniles
and young adults in the criminal justice system**

My attention has been drawn to the transcript of the House Committee's hearing in Darwin held on 6 May 2010, during its present inquiry. Reference was made during the hearing to a submission by myself and a colleague to the Senate Community Affairs Committee inquiry into petrol sniffing and substance abuse in Central Australia dated 27 October 2008. This submission is intended to assist the House Committee in its current inquiry by responding to some of the questions raised during the 6 May hearing and by reinforcing and updating our original submissions to the Senate Community Affairs committee.

I make this submission in my capacity as Director of the Indigenous Legal Issues Project at the Gilbert + Tobin Centre of Public Law and a Senior Lecturer in the Faculty of Law, University of New South Wales. I am solely responsible for its content.

The present submission can be summarised as follows:

SYDNEY 2052 AUSTRALIA
Email: s.brennan@unsw.edu.au
Telephone: +61 (2) 9385 2334
Facsimile: +61 (2) 9385 1175
Web: www.law.unsw.edu.au/staff

1. A single national law controlling the supply of unleaded fuel would be constitutionally sound.
2. A national law could be applied to selected geographical areas in a carefully targeted way.
3. A single national law appears appropriate and advantageous.
4. There are several potential problems in seeking to regulate this issue through template or uniform legislation at the State and Territory level.
5. The example of tort law reform through separate State and Territory legislation does not offer a persuasive argument to the contrary.

1. A single national law controlling the supply of unleaded fuel would be constitutionally sound.

Our submission to the Senate Community Affairs Committee inquiry into petrol sniffing in October 2008 stated that the Commonwealth has the constitutional capacity to regulate the stocking of standard unleaded fuel and thus promote its replacement with OPAL in areas within or proximate to the Northern Territory.

That submission said that the Territories power in s 122 of the Constitution and the Corporations power in section 51(xx) supplied a sound constitutional basis for such a law and that it was open to the Commonwealth to support the legislation through other powers as well.

As the House Committee will be aware, constitutional law experts at the University of Adelaide, in conjunction with colleagues at the South Australian Centre for Economic Studies, carried out a very detailed analysis of alternative legislative models for controlling the supply of aromatic petrol in areas where the risk of sniffing may be high and reached the same conclusion. In their report ('the SACES study'), which was commissioned by the Commonwealth Department of Health and Ageing and published in January 2010, they said:¹

In combination the Territory and Corporations powers would provide the constitutional foundations for a workable scheme to limit the availability of aromatic premium unleaded fuel and the mandatory use of Opal fuel in the proscribed areas.

2. A national law could be applied to selected geographical areas in a carefully targeted way.

Our original submission to the Senate Community Affairs Committee in October 2008 also made clear that a national law could be drafted so that it could be applied in a

¹ South Australian Centre for Economic Studies, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia* (2010) <[www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/\\$File/opalfuel-legislation2010.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/$File/opalfuel-legislation2010.pdf)> at 19.

targeted way, to defined geographical areas. It pointed out that attention by the Commonwealth to the specific wording of the legislation would allow it ‘to tailor the law well to the practical circumstances on the ground’, for example by giving a Commonwealth Minister the capacity ‘to impose the legal obligation on fuel suppliers in a selected geographical region’.²

Again the constitutional law experts at the University of Adelaide made a similar point in their report to the Commonwealth government in 2010. Indeed they demonstrated that different degrees of control might be exercised by a Minister across different areas according to the assessed risk of sniffing:³

He or she would then declare a ‘prescribed region’ for the purpose of the controls and specify which of the list of controls in the General Scheme would apply in that prescribed region. ...

The advantage of this approach is that controls can be applied on a tailored basis to individual ‘at risk’ regions as required. For instance, in some regions, it may be considered necessary to only prohibit the sale of RULP [Regular Unleaded Petrol] and not impose any controls on the sale and storage of PULP [Premium Unleaded Petrol]. In other regions, a ban on RULP plus more comprehensive controls on PULP may be beneficial.

I believe this addresses the question raised by Mr Laming MP in the House Committee’s hearing on 6 May 2010 about how to develop a national law that covers ‘large areas of the country where [petrol sniffing] is not a concern’.⁴

3. A single national law appears appropriate and advantageous.

The obvious advantage of taking the route of Commonwealth legislation to support the regulation of unleaded fuel in areas where sniffing is a risk is that it requires passage through a single bicameral parliament. The same point applies down the track, should later adjustment to the law by formal amendment be required.

The appeal of this, the most straightforward legislative option, is reinforced by surrounding circumstances which suggest that the exercise of Commonwealth legislative power in this instance would be an appropriate next step. Members of the Commonwealth Parliament are now well apprised of the problems associated with

² Sean Brennan and Jonathan Dillon (Gilbert + Tobin Centre of Public Law), *Submission to Inquiry into Petrol Sniffing and Substance Abuse in Central Australia*, 27 October 2008
<www.aph.gov.au/senate/committee/clac_ctte/petrol_sniffing_substance_abuse08/submissions/sub17.pdf> at 5-6.

³ South Australian Centre for Economic Studies, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia* (2010)
<[www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/\\$File/opalfuel-legislation2010.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/$File/opalfuel-legislation2010.pdf)> at ii.

⁴ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Proof Committee Hansard*, Thursday 6 May 2010, 79.

petrol sniffing and the benefits of the OPAL roll-out as a supply-side measure, through committee inquiries such as those conducted by the Senate Community Affairs Committee. The Commonwealth Government has already been sufficiently persuaded by the merits of OPAL to invest significant financial resources in the roll-out of OPAL in Central Australia. The Senate Community Affairs Committee, in its 2009 report, recommended that, subject to two preconditions being satisfied, Commonwealth legislation should proceed as a first-choice option over separate State and Territory laws.⁵ The SACES study effectively found in 2010 that both preconditions were satisfied.

In other words, the Commonwealth Parliament has not rushed into national legislation, but instead appears to have arrived, incrementally, at a point where the case for such a law is powerful and persuasive.

There are strong arguments that legislation of this kind would not breach anti-discrimination principles, but we agree with the authors of the SACES study that if indirect discrimination emerged as an issue it would be less complex to deal with in the context of a single national law.

4. There are several potential problems in seeking to regulate this issue through template or uniform legislation at the State and Territory level

In a federal system there is no one ‘right’ solution to regulation in all contexts where nationwide consistency is a high priority. Some issues are appropriately dealt with by collaborative legal and political mechanisms.

But the political, logistical and other difficulties of resorting to template, mirror or uniform legislation at the State and Territory level are well known. As we said in our evidence to the Senate Community Affairs Committee in October 2008:⁶

Each state and territory has capacity to make a law, including some capacity to make a law with effect beyond its borders, that is, with an extraterritorial operation, to use the constitutional jargon, but there are real difficulties when an extraterritorial law imposes prohibitions. If there are discrepancies between that law and a local law, it will probably deprive the first law of any effect.

It is also of course possible for the states and territories to cooperate on complementary legislation to mirror each other’s laws to achieve a uniform legal regime. We are aware that intergovernmental cooperation is an aspect of the

⁵ ‘Recommendation 3.51: If these retailers [resisting Opal fuel] do not voluntarily agree to supply Opal within 6 months, and if it is established that there are no legal impediments to the implementation of Commonwealth legislation, the Commonwealth government should immediately commence the drafting of legislation to mandate the supply of Opal fuel within the petrol sniffing strategy zone’: Senate Standing Committee on Community Affairs, *Grasping the opportunity of Opal: Assessing the impact of the Petrol Sniffing Strategy* (19 March 2009).

⁶ Senate Standing Committee on Community Affairs, *Official Committee Hansard*, 29 October 2008, 3.

federal strategy. All we say on that is that it is difficult to pull off uniform complementary legislation and then hard to keep it in sync.

The now President of the Australian Law Reform Commission, Professor Rosalind Croucher has written of the attempt since 1991 to develop uniform national succession laws across Australia:⁷

When we are talking about 8 separate jurisdictions with separate property laws (including succession laws), while their legislation has common roots, the total weight of the legislative fabric of each jurisdiction makes them heavy – difficult to move, even tweak, in concert.

Constitutional scholar Associate Professor Anne Twomey has written that formal ‘adoption’ in other States and Territories of a law enacted by a ‘lead jurisdiction’ can run into problems when amendment is required:⁸

While the principle of unanimity protects the interests of all involved, it may also result in matters being frozen in time because agreement cannot be reached on changes.

If the alternative is used of separately enacting standard form or ‘mirror’ legislation in each jurisdiction, the problem is maintaining consistency:⁹

The problem with ‘mirror’ legislation is that, unless great efforts are made to maintain uniformity, the legislation soon becomes inconsistent across the separate jurisdictions. Examples include: the *Petroleum (Submerged Lands) Act 1982* (NSW); the *Commercial Arbitration Act 1984* (NSW); the *Trade Measurement Act 1989* (NSW); the *Co-operatives Act 1992* (NSW); the *Road and Rail Transport (Dangerous Goods) Act 1997* (NSW); the *Crimes at Sea Act 1998* (NSW); and the *Electronic Transactions Act 2000* (NSW).

The SACES study summarised the position as follows:¹⁰

While uniform or template legislation on the part of the States would be effective it is not recommended because of a number of factors including; timing, consistency and need...

⁷ Rosalind F Croucher, ‘Towards Uniform Succession Laws in Australia’, Keynote Address—Trustee Corporations of Australia National Council Dinner, Sydney, 18 April 2007.

⁸ Anne Twomey, *The Constitution of New South Wales* (2004) 842.

⁹ *Ibid.*

¹⁰ South Australian Centre for Economic Studies, *Cost Benefit Analysis of Legislation to Mandate the Supply of Opal Fuel in Regions of Australia* (2010) <[www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/\\$File/opalfuel-legislation2010.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/BBA35A2CDB0F9DEFCA2576D9007E42C5/$File/opalfuel-legislation2010.pdf)> at 19, 25, 27.

The advantages of the Commonwealth legislated scheme is the speed with which it can enact into legislation; the uniformity of approach; the avoidance of threats to legality from anti-discrimination legislation, the ability to respond to changed circumstances through amendment and the capacity to add additional substances to the control list.

... the Commonwealth has the capacity to implement significant aspects of the scheme. Uniform or template legislation on the part of the States, such [as] in the area of criminal law, usually proceeds on the basis that the Commonwealth has an interest in uniform national laws, but lacks the capacity to implement them. This is not the case here.

For these, and other reasons, the approach of [...] leaving this issue to the States and Territory to legislate is the least preferred option.

5. The example of tort law reform through separate State and Territory legislation does not offer a persuasive argument to the contrary.

During the House Committee's hearing in Darwin on 6 May 2010, Mr Laming MP suggested that tort law reform offered an example of successful legislation amongst the States and Territories as an alternative to a single national law.¹¹ We understand that comment to refer to the fact that 'numerous statutes to implement "tort law reform" were passed in all Australian jurisdictions in the period 2001-2004'.¹² This followed the commissioning of an expert body (the Ipp Committee) by the heads of Commonwealth and State treasuries.

However, it is our understanding that the tort law reform process exhibits some of the risks associated with multilateral legislative enterprises. That is evident from the following comments drawn respectively from academia, the legal profession and the judiciary.

Professors Skene and Luntz, writing in 2005 soon after this phase of State and Territory law-making was over, said that the uniformity sought had not been achieved.¹³

The first recommendation of the Ipp Committee is headed "A national response" and calls for a single statute to be enacted in each jurisdiction to implement the succeeding proposals. Instead, there have been several tranches of law reform in each jurisdiction and the resulting statutes have not been uniform among the jurisdictions...

¹¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Proof Committee Hansard*, Thursday 6 May 2010, 79.

¹² Loane Skene and Harold Luntz, 'Effects of tort law reform on medical liability' (2005) 79 *Australian Law Journal* 345, 345.

¹³ *Ibid* 348.

Mark Doepel, a partner at the major law firm Minter Ellison writing with colleague Chad Downie, reached a similar conclusion in 2006. In doing so they made two points relevant to the present question of legislating a mandate for OPAL fuel. The first is that securing intergovernmental agreement can be time-consuming and ultimately fail. The second is that a multilateral legislative solution is typically used when the Commonwealth itself lacks constitutional power to act alone – that is not the case with OPAL, as noted earlier. Doepel and Downie wrote of a ‘patchwork picture’:¹⁴

Much of the Ipp Report was predicated upon the introduction of a Federal or National framework for reform. Given that Australia’s Constitution effectively rests responsibility for this area of law with the various States, this would need a co-operative effort by the States to achieve a uniform solution.

Unfortunately, on 15 November 2002, hopes for a uniformed scheme of legislation applying throughout the States and Territories were dashed when Federal and State governments rejected uniform tort law reform. The various finance ministers of the States instead opted for individual legislation to be enacted (indeed, some States had already made preliminary steps) as they were unable to reach agreement on a number of the key Ipp recommendations.

Doepel and Downie said that the State-based approach had achieved at best a ‘quasi-consistency’ across jurisdictions with a number of discrepancies on various key issues.¹⁵

Justice Anthony Whealy, of the Supreme Court of New South Wales, in a 2004 speech reviewing the impact of tort law reform, also found textual differences crept into the laws across different jurisdictions, creating uncertainty and the risk of other unwanted practical consequences:¹⁶

...despite assurances that uniform legislation would be provided in the various jurisdictions, there are in fact differences of expression throughout which are capable of having significantly different consequences for the outcome of litigation, depending on the State or Territory involved.

... The reforms have not always been uniform across the jurisdictions and the language of the statutory enactments has been, to a degree, quite different in some areas. While this is understandable having regard to Australia’s political system,

¹⁴ Mark Doepel and Chad Downie, ‘A patchwork picture: tort law reform in Australia’, *Australian Civil Liability*, Vol 2 No 9, 109.

¹⁵ A detailed breakdown of the variations amongst jurisdictions on particular issues in statutory tort law reform can be found in Prue Vines, ‘Faith, hope and personal injury: the Ipp Report and the Civil Liability Acts’, *Australian Civil Liability*, Vol 1 No 1, 1-7.

¹⁶ The Honourable Justice Anthony Whealy, ‘Reviewing the Impact of Tort Reform at a State and National Level’, LexisNexis Health and the Law Conference, Sydney, 29 June 2004, <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches#whealy> at 30, 41.

the consequent lack of uniformity carries with it a certain degree of uncertainty of outcome. This in turn has the capacity and potential to increase costs for both litigants and insurers.

The purpose of the proposed legislation discussed by the House Committee on 6 May 2010 is to *close loopholes* in a voluntary administrative regime, which allow the unrestricted sale of unleaded petrol. The risk is that a multi-jurisdictional patchwork is the very thing which could undermine the value and purpose of a *legislative* approach.

Yours sincerely

Sean Brennan
Project Director

I acknowledge the assistance of my colleagues Professor Prue Vines and Paul Kildea in preparing this submission.